92-193

No. _____

Supreme Court
FILED
JUL 2 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

JACK MORGAN, Warden,

Petitioner,

vs.

JAMES THOMAS JEFFERSON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES W. BURSON
Attorney General & Reporter
Counsel of Record

JOHN KNOX WALKUP
Solicitor General

GORDON W. SMITH
Deputy Attorney General

DEBRA K. INGLIS
Assistant Attorney General

450 James Robertson Parkway
Nashville, TN 37243-0485
(615) 741-7859
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Is a criminal defendant entitled to the reversal of his conviction based upon discrimination against blacks in the selection of grand jury members over a period of years, where the number of blacks on the grand jury which actually indicted him was representative of the percentage of blacks in the population?

II. Is a criminal defendant entitled to the reversal of his conviction based upon discrimination in the selection of grand jury members when the lack of prejudice to him is demonstrated by the petit jury's finding of guilt beyond a reasonable doubt?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

ARGUMENT

I. THE RESPONDENT IS NOT ENTITLED TO THE REVERSAL OF HIS CONVICTION BASED UPON PAST DISCRIMINATION AGAINST BLACKS IN THE SELECTION OF GRAND JURY MEMBERS WHERE BLACKS CONSTITUTED A PERCENTAGE OF MEMBERS OF THE GRAND JURY WHICH ACTUALLY INDICTED HIM WHICH WAS FULLY REPRESENTATIVE OF THE COMMUNITY 7

II. *VASQUEZ* SHOULD BE OVERRULED IN FAVOR OF A HARMLESS ERROR ANALYSIS 10

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES CITED

Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) 10, 12

Chapman v. California, 386 U.S. 18 (1967) 10

Jefferson v. State, 559 S.W.2d 649 (Tenn. Crim. App. 1977) 4

McNabb v. United States, 318 U.S. 332 (1943) 8

State v. Jefferson, 529 S.W.2d 674 (Tenn. 1975) 4

Thiel v. So. Pacific Co., 328 U.S. 217 (1946) 8, 9, 10

United States v. Cohen, 275 F.Supp. 724 (D. Md. 1967) 9

United States v. Dennis, 183 F.2d 201 (2nd Cir. 1950) ... 8, 9

United States v. DiTomnaso, 405 F.2d 385 (4th Cir. 1968) 9

United States v. Donohue, 574 F.Supp. 1269 (D. Md. 1983) 9

United States v. Guzman, 337 F.Supp. 140 (S.D. N.Y. 1972) 9

United States v. Mechanik, 475 U.S. 66 (1986) 10, 12

Vasquez v. Hillery, 474 U.S. 264 (1986) 6, 7, 11, 13

Zachary v. State, 66 Tenn. 1 (1872) 12

OTHER AUTHORITIES

U.S. Const. Amend. XIV, § 1 2

28 U.S.C. § 1254(1) 2

Fed. R. Crim. P. 6(d) 12

Tenn. R. Crim. P. 11 12

No. _____

In The

Supreme Court of the United States

October Term, 1992

JACK MORGAN, Warden,

Petitioner,

vs.

JAMES THOMAS JEFFERSON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Sixth Circuit was filed on April 29, 1992, and is cited at 962 F.2d 1185. The opinion appears as Appendix "A".

The unpublished opinion of the United States District Court for the Middle District of Tennessee was filed on May 20, 1991. The opinion appears as Appendix "B".

The published opinion of the United States District Court for the Middle District of Tennessee in the petitioner's first habeas corpus action was filed on March 30, 1985. It is reported at 607 F.Supp. 355.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 29, 1992. This petition was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. XIV, § 1:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

At its May, 1968 term, the Davidson County Grand Jury returned indictments against the respondent charging him with first-degree murder of John Robert Bolte; rape of Barbara Bolte, the wife of John Robert Bolte; assault with intent to murder Barbara Bolte; and assault with intent to murder the Boltes' 18-month-old daughter.

The 13-member grand jury contained one black regular member at the beginning of the May, 1968 term.

During the term, a second black person became a temporary, and then a permanent, replacement for one other member of the grand jury. During the same term, one other black person served as a temporary replacement. On the day that the evidence was presented against respondent Jefferson, as well as on the day the grand jury returned the indictment, two of its 13 members, constituting 15.38%, were black. During the time that the third black served, 23.08% of the members were black. At the time, the population of Davidson County over 21 years of age was approximately 17.8% black.

Prior to his trial, the respondent filed a plea in abatement alleging systematic exclusion of blacks from grand and petit juries in Davidson County. The motion was denied without a hearing.

Jefferson was first tried on the rape indictment. That trial ended in a mistrial.

Jefferson's trial for the murder of Mr. Bolte occurred in early 1971. The State presented proof that Jefferson broke into the Boltes' home late one night. He struck Mr. Bolte in the back of his neck with an ax, killing him. He stabbed Mrs. Bolte in the arm with a knife with such force that the handle broke off and the blade remained in her arm. He also struck her in the head with an ax, and raped her. He struck and wounded the Boltes' 18-month-old daughter with the ax. Mrs. Bolte positively identified Jefferson after giving a very accurate description of him to investigating officers. In addition, Jefferson was in possession of a large number of buffalo nickels like those taken from the Bolte home. More importantly, Jefferson had been in possession of the Benrus watch taken from

Mr. Bolte on the night of his murder. The name "Bolte" was inscribed on the watch in two places. The letters "Jeffer" and "son" were scratched on the back case. *State v. Jefferson*, 529 S.W.2d 674 (Tenn. 1975).

On March 5, 1971, the jury returned a verdict finding Jefferson guilty of murder in the first degree as charged in the indictment, and fixed his punishment at 99 years in the state penitentiary.

The Tennessee Court of Criminal Appeals affirmed the conviction, but remanded the case to the trial court for a hearing on the alleged systematic exclusion of blacks from grand and petit juries in Davidson County. The Tennessee Supreme Court affirmed the judgment of the Court of Criminal Appeals. *State v. Jefferson*, 529 S.W.2d 674 (Tenn. 1975).

Upon remand, the trial court conducted an evidentiary hearing concerning systematic exclusion and overruled the plea in abatement. The Court of Criminal Appeals affirmed the judgment, *Jefferson v. State*, 559 S.W.2d 649 (Tenn. Crim. App. 1977), and on October 11, 1977, the Tennessee Supreme Court denied certiorari.

On April 1, 1982, the respondent filed a petition for the writ of habeas corpus in the United States District Court for the Middle District of Tennessee alleging, among other things, systematic exclusion of blacks from grand juries in Davidson County. After an evidentiary hearing, the district court granted the writ and ordered the State to reindict the respondent within 90 days or release him.

The State appealed that decision to the United States Court of Appeals for the Sixth Circuit. In an order filed June 10, 1986, that court found that Jefferson had failed to exhaust available state remedies on all issues raised in the habeas petition. Accordingly, it reversed the judgment of the district court and remanded the case with instructions to dismiss the petition without prejudice.

Jefferson next filed a petition for post-conviction relief in the Criminal Court for Davidson County asking that his conviction be set aside on the basis of racial discrimination in the selection of forepersons on Davidson County grand juries. The trial court denied the petition after an evidentiary hearing. The Tennessee Court of Criminal Appeals affirmed that decision, and the Tennessee Supreme Court denied Jefferson's application for permission to appeal.

On May 10, 1989, Jefferson filed the instant action. The district court referred the case to a magistrate. Jefferson filed a motion to reinstate and reincorporate the district court's findings of fact and conclusions of law from the prior habeas corpus case. On January 18, 1991, the magistrate filed a report and recommendation recommending, among other things, that the motion to reinstate be granted.

On May 20, 1991, the district court entered an order overruling the State's objections to the report and recommendation, reinstating the findings of fact and conclusions of law from the prior case, and conditionally granting the writ of habeas corpus. The court ordered the State to reindict Jefferson within 90 days of entry of the order or release him from custody. The judgment was

stayed pending the State's appeal to the Sixth Circuit Court of Appeals.

On April 29, 1992, the Sixth Circuit affirmed the judgment of the district court. The State filed a timely motion for a stay of the mandate, which is currently pending.

REASONS FOR GRANTING THE WRIT

As is discussed in more detail below, the decision of the Court of Appeals presents two important questions of federal law regarding the applicability of the harmless error rule to claims of discrimination in the selection of grand jury members. The first issue warrants review by this Court so that it may correct a body of wrongly decided case law which has developed in the lower courts. As to the second issue, this case presents an appropriate vehicle for re-examining and overruling a wrongly decided precedent of this Court, *Vasquez v. Hillery*, 474 U.S. 264 (1986).

First, is a prisoner entitled to the reversal of his conviction based upon past discrimination against blacks in the selection of grand jury members when blacks were not underrepresented on the grand jury which actually indicted him? This issue is one which the Court has not previously addressed. However, as will be explained below, many lower courts, including the Sixth Circuit in this case, have erroneously held that a prisoner is automatically entitled to the reversal of his conviction if blacks were underrepresented on past grand juries, even

if the grand jury which indicted him mirrored the community. The reversal of such a conviction is not required to remedy the prejudice to the petitioner. It also is not justified by its deterrent effect, where the system which resulted in underrepresentation in years preceding the respondent's indictment was abandoned shortly thereafter and has not been in use for over 20 years.

Second, is a prisoner entitled to the automatic reversal of his conviction based upon discrimination in the selection of members of the grand jury which indicted him although a constitutionally selected petit jury has found guilt beyond a reasonable doubt, or can the error be considered harmless? Although this Court in *Vasquez v. Hillery*, 474 U.S. 264 (1986), refused to adopt a harmless error analysis for such an error, *Vasquez* is inconsistent with this Court's subsequent decisions concerning the application of the harmless error rule in other contexts. The petitioner submits that *Vasquez* should be overruled in favor of a harmless error analysis.

ARGUMENT

I. THE RESPONDENT IS NOT ENTITLED TO THE REVERSAL OF HIS CONVICTION BASED UPON PAST DISCRIMINATION AGAINST BLACKS IN THE SELECTION OF GRAND JURY MEMBERS WHERE BLACKS CONSTITUTED A PERCENTAGE OF MEMBERS OF THE GRAND JURY WHICH ACTUALLY INDICTED HIM WHICH WAS FULLY REPRESENTATIVE OF THE COMMUNITY.

The proof in this case shows that blacks were not underrepresented on the grand jury which indicted the

respondent. The courts below found that the respondent was entitled to habeas corpus relief based upon proof of underrepresentation of blacks on grand juries during years prior to his indictment. The petitioner submits that the reversal of a prisoner's conviction for systematic discrimination in selection of grand jurors is not appropriate where, as in this case, the grand jury which actually indicted the prisoner was fully representative of the community.

In *Thiel v. So. Pacific Co.*, 328 U.S. 217 (1946), the Court reversed a civil judgment based upon the exclusion of working class and less-wealthy persons from the panel from which the jury was chosen. In doing so, the Court stated that it was immaterial that the jury that sat on the case was found to contain at least five members of the laboring class. *Id.* at 225. However, the Court expressly rested its reversal of the judgment on the "exercise of [its] power of supervision over the administration of justice in the federal courts." *Id.* The Court cited as authority for its action *McNabb v. United States*, 318 U.S. 332 (1943), a federal criminal case in which the Court noted that its power to reverse convictions in state courts, unlike its power to reverse convictions in federal courts, is limited to the enforcement of those "fundamental principles of liberty and justice secured by the Fourteenth Amendment." *Id.* at 340. *Thiel*, therefore, has no application on the facts of this habeas corpus case.

In *United States v. Dennis*, 183 F.2d 201, 216 (2nd Cir. 1950), *aff'd. on other grounds* 341 U.S. 494 (1951), the Court was faced with a claim of systematic exclusion of lower economic groups from jury lists. It stated as follows:

> We *assume for argument* that if a jury list – that is, the list from which separate panels are drawn – was unlawful, any separate panel based upon that list was unlawful, though taken by itself it was unexceptionable. That is to say, we will *assume* that any party to a suit, civil or criminal, is entitled to have the particular panel which tries his case, drawn at random from a list which is not unlawfully weighted, and that he may complain even though he has not shown that the imbalance has prejudiced him.

Id. at 216 (emphasis added).

Based upon the assumptions stated in the quoted language, the Court nevertheless denied relief on the basis that the defendant failed to prove his claim. The Court did not hold that the fact that a jury is fully representative does not defeat a claim of systematic exclusion of an identifiable group. It found it unnecessary to decide the issue.

Notwithstanding the limited basis of this Court's holding in *Thiel*, and the absence of a resolution of the issue in *Dennis*, those cases have been cited numerous times by the lower courts as authority for the proposition that it is irrelevant to a claim of discrimination in the selection of jury panels that the defendant's own jury was representative. *See, e.g., United States v. Donohue*, 574 F.Supp. 1269, 1278 (D. Md. 1983); *United States v. Guzman*, 337 F.Supp. 140, 142 (S.D. N.Y. 1972), *aff'd.* 468 F.2d 1245 (2nd Cir. 1972), *cert. denied* 410 U.S. 937 (1973); *United States v. Cohen*, 275 F.Supp. 724, 739 (D. Md. 1967), *aff'd. on other grounds sub nom. United States v. DiTomnaso*, 405 F.2d 385 (4th Cir. 1968), *cert. denied* 394 U.S. 934 (1969). The petitioner submits that the cases which have

expanded this Court's holding in *Thiel* and reversed convictions based upon discrimination in the selection of members of past grand juries, where the grand jury which indicted the defendant contained a percentage of blacks approximating that of the population, are erroneous. This Court should grant certiorari in this case to address this issue.

II. *VASQUEZ* SHOULD BE OVERRULED IN FAVOR OF A HARMLESS ERROR ANALYSIS.

With very few exceptions, a conviction will not be reversed for an error unless the error prejudiced the defendant. The harmless error rule has been applied to constitutional, as well as nonconstitutional errors. *See Chapman v. California*, 386 U.S. 18 (1967). Recently, the rule has also been applied to errors occurring in the indictment process. *See Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988); *United States v. Mechanik*, 475 U.S. 66 (1986).

One of the few exceptions to the harmless error rule which has been recognized by this Court is that discrimination in the selection of grand jury members automatically requires the reversal of any conviction without any inquiry into whether the discrimination affected the verdict. *Vasquez, supra*. The Court has explained the result in *Vasquez* by characterizing it and other decisions involving exceptions to the harmless error rule as decisions involving situations "in which the structural protections of the grand jury have been so comprised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Bank of Nova Scotia v. United States*, 487

U.S. at 256-257. The Court stated that "any inquiry into harmless error would have required unguided speculation." *Id.* at 257.

The petitioner submits that the impact upon a defendant of discrimination in the selection of grand jury members may be easily assessed, like the impact of other errors in the indictment process. It is, therefore, an error which is more appropriately placed in the general category of errors which are subject to harmless error analysis. After a defendant has been found guilty beyond a reasonable doubt by a petit jury, no speculation is required to reach the conclusion that the underrepresentation of a segment of the population on a grand jury did not affect the grand jury's finding of probable cause.

In *Vasquez*, the majority rejected the argument that the confirmation of a grand jury's finding of probable cause by a conviction based upon proof beyond a reasonable doubt establishes that the grand jury discrimination did not prejudice the defendant. The majority reasoned that the discrimination could have affected "the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." 474 U.S. at 263. Thus, the majority was concerned with a court's ability to determine whether a constitutionally selected grand jury would have refused to indict despite the existence of probable cause. That concern is unwarranted for two reasons.

First, the decision of a grand jury to refuse to indict in a case presented to it, or its action in indicting on fewer or lesser charges than warranted by the evidence, is not an irreversible one. Nothing in Tennessee law precludes a

prosecutor from presenting the case to a subsequent grand jury and obtaining an indictment on all charges for which probable cause exists. *See Zachary v. State*, 66 Tenn. 1 (1872); Tenn. R. Crim. P. 11.

Second, a petit jury may refuse to convict a defendant despite the existence of proof beyond a reasonable doubt, just as a grand jury may refuse to indict a defendant despite the existence of probable cause. A petit jury's ability to engage in jury nullification, however, has never been held to be a basis for refusing to apply a harmless error rule to constitutional violations occurring at trial. A grand jury's opportunity to engage in jury nullification is even less justification for an automatic reversal for errors occurring in the indictment process. When a valid petit jury has returned a verdict finding a defendant guilty as charged in an indictment and declined to engage in jury nullification, the conviction confirms not only the grand jury's probable cause determination, but also its failure to exercise its option to refuse to indict even in the presence of probable cause.

This Court has applied the harmless error rule to other errors occurring in the indictment process. In *United States v. Mechanik*, 475 U.S. 66 (1986), the Court held that a violation of Rule 6(d) of the Federal Rules of Criminal Procedure forbidding the presence of more than one witness at a time before the grand jury was harmless in light of the verdict by the petit jury finding the defendant guilty beyond a reasonable doubt. In *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), the Court held that an indictment may not be dismissed for prosecutorial misconduct which does not prejudice the defendant. It is

no more difficult to assess the prejudicial impact of discrimination in the selection of grand jury members than to assess the prejudicial impact of other errors in the indictment process. The harmless error rule is appropriate.

An automatic reversal rule also is not justified on the basis of the need for deterrence of discrimination in selection of grand jurors. The proof in this case shows that the grand jury selection system which the respondent attacks was discontinued in Davidson County approximately in 1971, shortly after the respondent's indictment. The reversal of the respondent's conviction 24 years after the petitioner's indictment would certainly have no effect on grand jury selection procedures today.

Based upon the foregoing, the petitioner submits that this Court should grant certiorari in this case and reverse its decision in *Vasquez*.

CONCLUSION

For the reasons stated, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

CHARLES W. BURSON
Attorney General & Reporter
Counsel of Record

JOHN KNOX WALKUP
Solicitor General

GORDON W. SMITH
Deputy Attorney General

DEBRA K. INGLIS
Assistant Attorney General

450 James Robertson Parkway
Nashville, TN 37243-0485
(615) 741-7859

Counsel for Petitioner

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
PURSUANT TO SIXTH CIRCUIT RULE 24

No. 91-5764

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES THOMAS JEFFERSON, *Petitioner-Appellee,* v. JACK MORGAN, Warden, *Respondent-Appellant.*	)))))))	ON APPEAL from the United States District Court for the Middle District of Tennessee

---

Decided and Filed April 29, 1992

Before: KEITH and MARTIN, Circuit Judges; and BELL, District Judge.*

BOYCE F. MARTIN, JR., Circuit Judge. Jack Morgan, who is warden of the Tennessee State Penitentiary, appeals the judgment of the district court granting James Thomas Jefferson a writ of habeas corpus under 28 U.S.C. § 2254. For the following reasons, we affirm.

---

*The Honorable Robert Holmes Bell, United States District Judge for the Western District of Michigan, sitting by designation.

On July 23, 1968, a Davidson County, Tennessee, grand jury indicted Jefferson, a black citizen, for first-degree murder, rape, and assault with intent to commit murder. The grand jury that indicted Jefferson contained two black members out of 13 total members. Prior to trial, Jefferson filed a plea in abatement alleging a systematic exclusion of blacks from grand and petit juries in Davidson County. Without the benefit of a hearing, the trial court denied Jefferson's plea after ruling there was no systematic exclusion of blacks from juries.

Jefferson's first trial ended when the trial court declared a mistrial because the petit jury, which was composed of seven whites and five blacks, was unable to reach a unanimous verdict. At his second trial, Jefferson again alleged that the county had systematically excluded blacks from grand and petit juries. The trial court overruled Jefferson's objection, and the jury, which was composed of ten whites and two blacks, convicted Jefferson. He was sentenced to 99 years in prison.

On appeal, the Tennessee Court of Criminal Appeals remanded the case to the trial court with instructions to conduct an evidentiary hearing on the issue of the systematic exclusion of blacks from juries. The Tennessee Supreme Court affirmed the remand order. On remand, the trial court limited Jefferson's proof of his claim to the composition of the particular grand jury that indicted him and to the particular petit jury that convicted him. The trial court subsequently held there was no systematic exclusion of blacks from either jury. In 1977, the Tennessee Court of Criminal Appeals affirmed the trial court's decision, and the Tennessee Supreme Court denied certiorari.

On April 1, 1982, Jefferson filed a petition for a writ of habeas corpus in federal district court. Jefferson requested the district court to quash his indictment and to vacate his conviction because Davidson County had systematically excluded blacks from grand and petit juries in violation of the Equal Protection Clause and the Sixth Amendment's fair-cross-section requirement. At an evidentiary hearing, Jefferson presented evidence that in the decade prior to his indictment, from 1958 through 1968, two criminal court judges selected grand jurors under a "key man" system. Under the "key man" system, the judges personally selected prospective grand jurors from the community at large. During this time period, the judges selected 33 grand juries, with each grand jury being composed of 13 members including one foreperson. Of the 33 grand juries, Jefferson established the racial composition of 26 grand juries. The proof showed that no more than 20 blacks served in the 338 positions available on the 26 grand juries. Consequently, the grand juries were, at most, 5.9% black. During this same time period, the population of Davidson County was approximately 18.5% black. The district court concluded the state had violated equal protection guarantees by systematically excluding blacks from grand juries including excluding blacks from the position of grand jury foreperson. The court granted Jefferson a writ of habeas corpus and ordered the state to re-indict Jefferson within 90 days or release him from custody.

On appeal, this court held that under *Rose v. Lundy*, 455 U.S. 509 (1982), Jefferson had failed to exhaust available state remedies on the grand jury foreperson issue. We reversed the district court's judgment and ordered the

district court to dismiss the petition without prejudice. On August 26, 1986, Jefferson filed a petition for post-conviction relief in the Criminal Court for Davidson County requesting the court to vacate his murder conviction because of racial discrimination in the selection of grand jury forepersons. After a hearing, the court rejected Jefferson's claim and dismissed his petition. The Tennessee Court of Criminal Appeals affirmed the trial court's judgment, and the Tennessee Supreme Court denied review.

On May 10, 1989, Jefferson filed this current action, seeking a writ of habeas corpus. Jefferson alleged that Davidson County had systematically excluded blacks from grand juries and also from the position of grand jury foreperson in violation of the Equal Protection Clause. Pursuant to 28 U.S.C. § 636(b)(1)(B), the district court directed a magistrate judge to conduct a hearing and submit a report. In his report, the magistrate recommended that under the "law of the case" doctrine the court should reinstate its prior decision finding that Davidson County had systematically excluded blacks from grand juries. On May 20, 1991, the district court adopted the magistrate judge's Report and Recommendation, reinstated the court's earlier findings of fact and conclusions of law, and granted Jefferson a writ of habeas corpus. The court again ordered the state to re-indict Jefferson within 90 days or release him from custody. The district court, however, stayed its order pending appeal.

On appeal, Morgan contends that the district court's decision is erroneous on three possible grounds. First, Morgan asserts that Jefferson failed to establish a prima facie case of racial discrimination in the selection of

grand juries. Second, Morgan argues that he rebutted any prima facie case that Jefferson established. Finally, Morgan contends that even if Jefferson established a violation of equal protection, this court should not reverse Jefferson's conviction and dismiss the indictment.

Although there is no constitutional right to be indicted by a state grand jury, if a state chooses to use a grand jury, it must select members of the grand jury without discrimination based on race or color. *Aldridge v. Marshall*, 765 F.2d 63, 68 (6th Cir. 1985), *cert. denied sub nom. Aldridge v. Morris*, 474 U.S. 1062 (1986). The Supreme Court has long held that racial discrimination in the selection of a grand jury violates a defendant's equal protection rights. *See e.g., Swain v. Alabama*, 380 U.S. 202 (1965); *Cassell v. Texas*, 339 U.S. 282 (1950); *Strauder v. West Virginia*, 100 U.S. 303 (1879). In *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979), the Supreme Court summarized the harm resulting from excluding potential grand jurors because of their race:

> Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice. As this Court repeatedly has emphasized, such discrimination 'not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.' *Smith v. Texas*, 311

> U.S. 128, 130 (1940) (footnote omitted). The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole.

In order to prove discrimination in the selection of grand jurors, a petitioner may show that the procedure employed by the state resulted in a substantial underrepresentation of his race or of the identifiable group to which he belongs. *Castaneda v. Partida*, 430 U.S. 482, 494 (1977). Specifically, to establish a prima facie case of discrimination, a petitioner must satisfy a three-part test. First, he must establish that the group excluded from the grand jury is one that is a recognizable, distinct class capable of being singled out for different treatment under the laws. *Id.* Second, he must establish that the selection procedure used by the state to select grand juries is susceptible to abuse or is not racially neutral. *Id.* Finally, he must establish the degree of underrepresentation occurring over a significant period of time by comparing the proportion of the excluded group in the total population to the proportion serving as grand jurors. *Id.* Courts refer to this final part of the three-part test as the "rule of exclusion." The rationale behind the "rule of exclusion" is that if a disparity is sufficiently large over a significant period of time, then it is unlikely that the disparity is due solely to chance or to accident, and in the absence of evidence to the contrary, a court should conclude that racial or other class-related factors entered into the selection process. *Id.* at n. 14. Once the petitioner has established a prima facie case, the burden shifts to the state to rebut the inference of intentional discrimination. *Id.* at 495.

In this case, Jefferson has established a prima facie case of racial discrimination. First, there is no question that Jefferson, as a black citizen, is a member of the distinct class that is capable of being singled out for different treatment under the laws. *See Rose*, 443 U.S. at 565. Second, the "key man" system, which was the process used to select grand jurors during the time period in which Jefferson was indicted, was susceptible to abuse. *See id.* at 566; *Castaneda*, 430 U.S. at 497.

Finally Jefferson has satisfied the "rule of exclusion." During the relevant time period, the state empanelled 33 grand juries. Jefferson and the state could not accurately establish the racial composition of several grand juries; however, the evidence demonstrated that on 26 grand juries no more than 20 blacks served in the 338 grand jury positions available. Thus, no more than 5.9% of the grand jurors were black. During the same period, the population of Davidson County was composed of approximately 18.5% blacks.

Morgan's assertions notwithstanding, comparing straight racial percentages is of little value to this court. In *Moultrie v. Martin*, 690 F.2d 1078 (4th Cir. 1982), the Fourth Circuit nicely stated the rationale for not merely comparing straight racial percentages:

> When a litigant seeks to prove his point exclusively through the use of statistics, he is borrowing from another discipline, mathematics, and applying these principles to the law. In borrowing from another discipline, a litigant cannot be selective in which principles are applied. He must employ a standard mathematical analysis. Any other requirement defies logic to the point

> of being unjust. Statisticians do not simply look at two statistics, such as the actual and expected percentage of blacks on a grand jury, and make a subjective conclusion that the statistics are significantly different.

Id. at 1082. We do recognize that the Court in *Castaneda* compared the percentage of Mexican-Americans with the percentage of Mexican-Americans in the relevant population. *See Castaneda,* 430 U.S. at 495-96. In an extensive footnote, however, the Court made reference to using standard deviation analysis as a means of predicting the significance of racial disparities. *See id.* at n.17. *See also Ford v. Seabold,* 841 F.2d 677, 684 n.5 (6th Cir. 1988) (acknowledging the use of statistical decision theory in the context of equal protection claims, but rejecting its use in the context of a fair-cross-section claim). Standard deviation is a measure of the extent to which an observed result is likely to vary from an expected result. The larger the number of standard deviations an observed result is from an expected result, the lower the probability that the observed result is random. More specifically, in the context of racial discrimination claims, the larger the number of standard deviations, the more likely the observed result is the product of discrimination rather than chance.

Before applying standard deviation analysis, we need to determine how may blacks one would have expected Davidson County to select out of the 338 grand jury positions available. The formula for determining an expected result is: n x p, where "n" is the sample size (here, the total number of grand jurors selected by the county, which is 338) and "p" is the proportion of items possessing the characteristic that is being investigated

(here, the proportion of blacks in Davidson County, which is 0.185). Applying the formula to the statistics at hand, we have determined that in the 26 grand juries empaneled by Davidson County, one would have expected the county to have selected approximately 63 black grand jurors. They, of course selected 20 black grand jurors.

The formula for determining standard deviation is: $\sqrt{n} \times p \times (1-p)$. See W. Mendenhall, *Introduction to Probability and Statistics* 180 (6th ed. 1983). Using this formula, the standard deviation of the sample is 7.1 blacks. This means that a statistician would expect that if Davidson County had randomly selected the 338 grand jurors it would have selected approximately 63 +/- 7 blacks. The final step in our analysis is determining by how much the expected result (63 blacks) and the observed result (20 blacks) differ in terms of standard deviations. this difference is called the "z-score" or standard score, and its formula is: (observed result-expected result)/(standard deviation). See *id.* at 211. In this case, the data yields a difference of approximately -6 standard deviations.

We decline to decide at what point a court should conclude that the difference between the expected result and the observed result is significant enough to establish a prima facie case of discrimination. *See Castaneda*, 430 U.S. at 496 n.17. ("As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist.") In this case, however, we do hold that -6 standard deviations is

sufficient to establish a prima facie case of racial discrimination. Given the racial composition of Davidson County, the odds that the county would have *randomly* selected only 20 blacks for the 338 grand jury positions are approximately 1,000,000,000 to 1. *See CRC Standard Probability and Statistics Tables and Formulae* 124 (William Breyer ed., 1991) Thus, the hypothesis that Davidson County drew grand jurors without regard to race is suspect. In sum, because Jefferson has satisfied all three parts of the *Castaneda* test, we hold that he has established a prima facie violation of the Equal Protection Clause.

Morgan asserts that Jefferson cannot establish a prima facie case because the particular grand jury that indicted Jefferson was 15.4% black and thus almost perfectly reflected the proportion of blacks in the eligible pool of grand jurors (18.5%). Morgan's assertion, however, is without merit. In *Alexander v. Louisiana*, 405 U.S. 625, 628 (1972) (citation omitted), the Supreme Court stated:

> Although a defendant has no right to demand that members of his race be included on the grand jury that indicts him, he is entitled to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice.

In other words, the Equal Protection Clause *does not* guarantee a black defendant seven, five, or even one black on any grand jury that indicts him. The clause *does not* guarantee a black defendant a grand jury that accurately reflects the racial composition of the community. The Equal Protection Clause *does* guarantee, however,

that a state will not exclude *any* grand juror simply because he or she is black. Thus, the fact that the grand jury that indicted Jefferson contained two blacks does not defeat his equal protection claim.

Granted, as Morgan asserts, a petitioner may prove discrimination in ways other than by evidence of long-term underrepresentation. In *Batson v. Kentucky*, 476 U.S. 79, 95 (1986), the Supreme Court noted that absent evidence of systematic, long-term underrepresentation, a petitioner could establish a prima-facie case of an equal protection violation by demonstrating that (1) members of his race were substantially underrepresented on the venire from which his particular jury was drawn; and (2) the venire was selected under a practice providing an opportunity for discrimination. We, however, do not see *Batson* as standing for the proposition that Jefferson is precluded from proving an equal protection violation simply because he had the "right number" of blacks on his grand jury; there is no "right number" of blacks on a grand jury. The long line of Supreme Court cases including *Castaneda* and *Batson* stand for the proposition that a petitioner can establish a prima facie case of racial discrimination in the selection of jurors by demonstrating *either* (1) underrepresentation of the petitioner's race on the particular grand jury that indicted the petitioner and a selection system that is subject to abuse; *or* (2) underrepresentation of the petitioner's race on numerous grand juries over a significant period of time. Either showing produces an inference that the state discriminated in selecting a petitioner's particular grand jury.

Next, Morgan argues that he rebutted any prima facie case that Jefferson established. The rebuttal evidence introduced by the state consisted of the testimony of Judge John Draper and Judge Raymond Leathers, the two criminal court judges who were primarily responsible for selecting grand jurors during the relevant time period. The judges denied that they excluded jurors on the basis of race. They testified that in order to recruit grand jurors they depended on first-hand knowledge and on recommendations from friends and civic groups. Both judges used supposedly objective guidelines to select grand jurors, including citizenship activities, maturity, work experience, and standing in the community. We believe the judges' testimony constitutes no more than affirmations of good faith, which are insufficient to rebut the prima facie case established by Jefferson. *See Alexander,* 405 U.S. at 632.

Finally, Morgan argues that even if Jefferson established an equal protection violation, the appropriate remedy is not for us to reverse Jefferson's conviction and dismiss the indictment. Morgan argues, in essence, that even if the grand jury that indicted Jefferson was selected in an unconstitutional manner, the violation was harmless in light of the fact that a trial jury has found Jefferson guilty beyond a reasonable doubt. In other words, Morgan appears to argue that Jefferson's subsequent conviction purged any taint attributable to an unconstitutional grand jury selection process. We, however, reject Morgan's argument. In rejecting an identical argument, the Supreme Court stated:

> Nor are we persuaded that discrimination in the grand jury has no effect on the fairness of the

> criminal trials that result from the grand jury's actions. The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense – all on the basis of the same facts. . . . Thus even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or the very existence of the proceedings to come.

Vasquez v. Hillery, 474 U.S. 254, 263 (1986). *See also Rose*, 443 U.S. at 551 ("[W]here sufficient proof of discrimination in violation of the Fourteenth Amendment has been made out and not rebutted, this court uniformly has required that the conviction be set aside and the indictment returned by the unconstitutionally constituted grand jury be quashed.").

Morgan's reliance on *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), and *United States v. Mechanik*, 475 U.S. 66 (1986), is misplaced. *Bank of Nova Scotia*, 487 U.S. at 252, involved the dismissal of an indictment based on prosecutorial misconduct. The Supreme Court applied harmless-error analysis and held that the district court could not dismiss the indictment for errors in the grand jury proceedings unless the errors prejudiced the defendant. *Id.* at 254. The court cautioned, however, that cases like *Bank of Nova Scotia* were distinguishable from cases

like *Vasquez* because the latter cases were "ones in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Bank of Nova Scotia*, 487 U.S. at 257. In *Mechanik*, the Fourth Circuit had reversed the defendants' convictions because two government witnesses had testified in tandem in front of the grand jury that indicted the defendants. 475 U.S. at 67. The Supreme Court reversed the Fourth Circuit because "the petit jury's verdict of guilty beyond a reasonable doubt demonstrat[ed] a fortiori that there was probable cause to charge the defendants with the offenses for which they were convicted." *Id.* The Court, however, did not overrule *Vasquez;* it simply distinguished the case. *See id.* at 70 n.1. Despite the Supreme Court's holdings in *Bank of Nova Scotia* and *Mechanik, Vasquez* remains good law.

In summary, we hold that Jefferson has established a prima facie case of an equal protection violation, and the state has failed to rebut the prima facie case. We therefore affirm the judgment of the district court and direct the State of Tennessee to re-indict Jefferson within 90 days or release him from custody.

APPENDIX B

IN THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JAMES THOMAS JEFFERSON	)	DOCKET NO.
VS.	)	3:89-0382
	)	
JACK MORGAN	)	

ORDER

The Court is in receipt of the Report and Recommendation of the Magistrate, and the respondent's objections thereto. The Court finds the respondent's objections to be without merit, and therefore ADOPTS the Report and Recommendation of the Magistrate. Accordingly, the Court's earlier findings of fact and conclusions of law are REINSTATED, and the petition for a writ of habeas corpus is GRANTED. The state of Tennessee is ORDERED to reindict the petitioner within ninety days of entry of this order, or to release him from custody.

Entered this the 20th day of May, 1991.

/s/ John T. Nixon
UNITED STATES
DISTRICT JUDGE